(33)

FILED
JUN 14 1941
CHARLES ELMORE CROPLEY
CLERK

24-638

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 167.

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

IRVINE E. UNGERMAN,
Ritz Building,
Tulsa, Oklahoma,
I. J. RINGOLSKY,
HARRY L. JACOBS,
515 Commerce Building,
Kansas City, Missouri,
WM. G. BOATRIGHT,
616 Commerce Building,
Kansas City, Missouri,
Counsel for Petitioners.

INDEX

Petition for Writ of Certiorari—

A. Summary of matter involved 1
B. Statement of the basis for jurisdiction 5
C. Questions presented 5
D. Reasons relied on for allowance of the writ 6

Brief in Support of Petition for Writ of Certiorari—

I. The opinion of the court below 9
II. Jurisdiction 9
III. Statement of the case 10
IV. Specification of errors 10
V. Argument 11

Cases Cited

Central Trust Co. vs. Adams, 107 Kan. 126, 190 Pac. 775 ..... 11, 16
Erie Railroad Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 ..... 5, 6, 16
Fee & Liddon Co. vs. Porter, 144 Kan. 108, 58 Pac. 2d 55 ..... 13, 15
In re Mills' Estate, 107 Kan. 492, 192 Pac. 761 11
Moore vs. Illinois Central Railroad Co., 311 U. S. ....., 61 S. Ct. 392 ..... 5, 6
Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860 ..... 5, 6
Sloss-Sheffield Steel & Iron Co. vs. Stover Mfg. & Engine Co., 37 F. 2d 877 16

Court Rule

Rule 38 5

Code

Judicial Code, amended by Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)) 5

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Sonken-Galamba Corporation, a corporation, and W. C. Berry respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

Butler Iron & Steel Company, Inc., as seller, sued Sonken-Galamba Corporation and W. C. Berry, as buyers

(R. 1-5), seeking damages for breach by the buyers of a contract for the sale of scrap iron and steel from certain condemned oil storage tanks located in Oklahoma and Kansas. Federal jurisdiction was based on diversity of citizenship (Pet. Sec. 1, R. 1, Finding of Fact 1, R. 19-20). Trial in the District Court without a jury resulted in a judgment against petitioners for $22,055.94 (R. 29-30).

The contract sued on is a Kansas contract (Conclusions 1 & 2, R. 26).

It was conceded at the trial by Butler's president (R. 84) that following breach of the contract by petitioners Butler had elected to resell the scrap covered by the contract, credit the net proceeds of the sale and hold the buyers for the difference (R. 84); also, it was conceded that a resale, pursuant to such election, had been made (R. 84, Ex. A, R. 46-49) and that subsequently, without notice to the buyers (R. 83) and for private reasons existing between Butler and the purchaser at such resale (R. 49-50; 83), the contract of resale had been cancelled (R. 49-50) and that Butler had thereafter, without notice to petitioners (R. 85-86), applied said scrap in filling certain commitments it had with others.

The price obtained by Butler on the resale (under the contract which it subsequently cancelled) was substantially in excess of what the Court found to be the market price at the time of breach.[1] The net proceeds realized

---

[1]The difference is approximately $1,500.00. The Court found (R. 23, Finding XI) the market price on July 15, 1938, to be $6.00 per net ton f. o. b. cars at location and deducted 50 cents a net ton for loading, making a net market price of $5.50 per net ton. The resale contract to the Horwitz Iron & Metal Company was on the basis of $6.10 per net ton as is, where is (R. 46-49).

by Butler by subsequent application of the scrap on its own commitments to others was not disclosed.[2]

Butler, both by its petition and by the character and scope of its evidence, proceeded on the theory that it was entitled to recover the difference between the contract price and the market price at the time and place of breach. The District Court adopted Butler's views, holding that "resale is immaterial" (Conclusion of Law 3, R. 26) notwithstanding decisions of the Supreme Court of Kansas that when a buyer breaches a contract of sale and there is an election by the seller to resell, no recovery can be had on any other theory than the difference between the net proceeds of resale and the contract price, and this, even though the price on resale may in a particular case coincide with the market price.

The Circuit Court of Appeals, in affirming the judgment, held that in view of Butler's cancellation of the contract of resale there was no election to resell, a holding likewise directly in conflict with the decisions of the Supreme Court of Kansas.

Both courts have, therefore, proceeded to set at naught definite, well settled rules of law announced by the Supreme Court of Kansas fixing the basis upon which and the extent to which a buyer can be held liable for damages for breach of a contract of sale.

---

[2]After the trial, Butler filed a paper with the Clerk (held by the trial court in making up the record for the appeal to be no part of the evidence (R. 207)) indicating that the scrap had been applied on contracts Butler had with the American Rolling Mills Company and that it had received a gross amount of $32,739.86. The contract price would have netted Butler $35,534.57, a difference of only $2,794.71. On the paper, however, Butler charged $22,588.12 for deductions. Whether the deductions are correct or warranted was not the subject of inquiry at the trial in view of Butler's theory adopted by the District Court.

There can be no real question as to the election of Butler to resell. Butler notified petitioners that it would resell the remaining scrap for the account of the buyers, credit the amount received and sue for the difference (R. 84, 188-189; 193-195).

Pursuant to such notice and intention, Butler undertook to sell said material and sent out letters to dealers stating that "Sonken-Galamba Corporation are not going to fulfill their contract with us and, therefore, *we are offering for sale* the balance of scrap material" (Exs. J. K, L, M, N, R. 59-60), and on July 30, 1938, entered into a formal, written contract of sale and did sell said material to Horwitz Iron & Metal Company (Ex. A, R. 46-49). The contract of sale was a formal document drawn by an attorney and sworn to before a notary public (R. 82).

According to Butler's president the contract was subsequently rescinded orally on August 7th or 8th because Mr. Horwitz requested it (R. 50, 80) but without notice to petitioners (R. 83).

Butler's president admitted:

> "I knew that my attorney had *given notice* some time after the 1st of July, toward the latter part of July, that he was going to *sell* the material for the account of the defendant and *credit the amount received and sue for the difference.* The reason I asked these bids from these various possible purchasers was pursuant to that notice that had been given to Sonken-Galamba and Berry that we were going to sell at private sale; this *sale that was made to Horwitz was pursuant to our intention to sell at private sale*" (R. 84).

B.

Statement of the Basis for Jurisdiction.

(a) The writ of certiorari is applied for under Rule 38 of this Court and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)) and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit is April 30, 1941 (R. 219; Opinion same date, R. 211).

(c) The following cases also sustain the jurisdiction:

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860.

Moore v. *Illinois Central Railroad Co.*, 311 U. S. , 61 S. Ct. 392.

C.

Questions Presented.

Can the courts of the United States in determining the liability and extent of liability of a buyer who has breached a Kansas contract of sale of personalty allow a recovery by the seller of the difference betwen the contract price and the market price in the face of a concession by the seller that following the breach it elected to resell, credit the proceeds and hold the buyer for the difference?

The Circuit Court of Appeals held that the measure of damages for breach of contract in the case at bar was the difference between the contract price and the market value of the goods; that the election

to resell and credit proceeds was consistent with the alternative remedy to sue for the difference between market price and contract price and constituted no election of remedies.

The Kansas Supreme Court in *Central Trust Co.* v. *Adams*, 107 Kan. 126, 190 Pac. 765, held that the remedies were inconsistent and that an election to resell and credit proceeds constitutes an irrevocable election of remedy which precludes the party from afterwards suing on any other basis.

Can such election be treated as of no effect because the seller, after resale, pursuant to such election, for reasons satisfactory to it permits a cancellation of the contract of resale?

Can recovery be had on any other basis than that announced by the Supreme Court of Kansas, namely, by pleading and proof of a fair resale pursuant to such election, full disclosure and crediting of the net proceeds of such resale and assertion of claim for the difference?

D.

Reasons Relied on for Allowance of the Writ.

1. The salutary rule announced by this Court that "the law to be applied in any case is the law of the State,"[3] except as to matters not now in question, places the duty on the courts of the United States to see that their judgments do conform to the law of the State. It is not enough for those courts to, as here, admit (Conclusions 1 and 2, R. 26) that the rights of the parties

---

[3]**Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860;
Moore v. Illinois Central Railroad Co., 311 U. S. ....., 61 S. Ct. 392.

are subject to and governed by the Kansas law. They must, if the rule is to be made effective, freely and completely apply the law of the State as expounded and applied by the courts of the State. No diminution by pronouncement of exceptions inconsistent with the underlying reason of a State rule of law or already expressly repudiated by the state courts can be permitted.

2. Specifically the District Court and the Circuit Court of Appeals have failed to be bound by and to follow specific principles of law announced and applied by the Supreme Court of Kansas in such a situation as this; have disregarded and minimized the full force and effect of the decisions of the Supreme Court of Kansas; have rendered a decision involving a question of commercial law contrary to the manner in which the question would have been decided by the courts of Kansas.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11878, Civil, *Sonken-Galamba Corporation, a Corporation, and W. C. Berry, Appellants* v. *Butler Iron & Steel Company, Incorporated*, and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Hon-

orable Court may seem meet and proper; and your petitioners will ever pray.

Sonken-Galamba Corporation,
a Corporation,
W. C. Berry,

By IRVINE E. UNGERMAN,
Ritz Building,
Tulsa, Oklahoma,

I. J. RINGOLSKY,
HARRY L. JACOBS,
515 Commerce Bldg.,
Kansas City, Missouri,

WM. G. BOATRIGHT,
616 Commerce Bldg.,
Kansas City, Missouri,

Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit was rendered April 30, 1941. It is reported as *Sonken-Galamba Corporation et al.* v. *Butler Iron & Steel Company, Inc.*, in 119 F. 2d 283. It is shown in full at pages 210-218 of the printed Record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this Court has been given under heading B in the peti-

tion, *supra*. In the interest of brevity, it is not repeated here.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition, *supra*, and in the interest of brevity will not be repeated at this point.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of a contract of sale determination and notice by seller that it will resell for the account of buyer and credit proceeds, followed by such resale, does not constitute an irrevocable election precluding recovery on any other basis.

2. The Circuit Court of Appeals erred in refusing to recognize, follow and apply the law of the State of Kansas as to the basis of liability and measure of damages upon breach of a Kansas contract of sale where the seller has elected to resell, credit the proceeds and hold the buyer for the difference.

3. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of contract of sale, where seller elected to resell for account of buyer and credit proceeds, recovery could be had upon pleading and proof of difference between contract price and market value of goods.

4. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of contract of sale, where seller elected to resell for account of buyer and credit proceeds, measure of damages is difference between the contract price and market value of the goods.

V.

ARGUMENT.

In Kansas it is held that on breach of a contract of sale by the buyer the seller has a choice of remedies he may pursue. One choice he may make is to treat the contract as broken, resell the goods to recompense himself as far as possible for whatever loss he has sustained and sue to recover "the remaining damages." If the seller determines to and notifies the buyer that he will pursue this course, it is an "irrevocable" election. He cannot thereafter abandon such election and sue for the contract price or the difference between the contract price and the market price. In Kansas these principles apply to all sales contracts, regardless of whether the title to the goods has passed or not. *Central Trust Co.* v. *Adams,* 107 Kan. 126, 190 Pac. 775; *In re Mills' Estate,* 107 Kan. 492, 192 Pac. 761.

The leading case is *Central Trust Company* v. *Adams,* 107 Kan. 126, 190 Pac. 755 (on petition for rehearing—107 Kan. 492, 192 Pac. 761). Adams sold to Mills and took notes for the payment of the purchase price. Mills defaulted and Adams resold at private sale but applied the proceeds as part payment of the notes. Mills died and the unpaid balance of the notes was presented to and allowed by the Probate Court as a valid claim against his estate. The administrator, thereupon, sued Adams on the theory that, by reselling, Adams rendered himself unable to perform and consequently should return that portion of the purchase price which he had received. The Probate Court and the District Court of Kansas agreed with the administrator's theory and rendered judgment against Adams, which was reversed by the Supreme Court of Kansas.

> "We start, therefore, with a very simple and very common transaction. There was a sale of goods on credit, installments of the price were represented by

notes, title passed to the buyer, possession remained with the seller, and delivery was to be made on full payment of the price.

The buyer defaulted. His delinquency was persistent, so far as the evidence discloses was unexplained, and the seller was at liberty to choose some remedy from those which the law afforded him. He chose the remedy of self-help, resold the goods, and applied the proceeds of the resale to satisfaction of the oldest notes.

There is debate in the books concerning the capacity in which a seller like Adams acts when holding the goods, and when reselling them for the account of the buyer. Much of the debate is logomachy, resulting from the craving to name, and by naming to bring within some established general category, something not quite fitting into any such category. The word 'lien' is broad enough and descriptive enough to permit its employment in this connection, and it is enough to designate it 'seller's lien.' Likewise when the seller resells the goods it is enough to say that he acts as a seller having a seller's lien.

It is quite elementary that *just before resale* of the stock Adams stood at a point from which three paths diverged. He could *eliminate* the contract by rescinding the sale, treat the goods as his own, and do as he liked with them. He could *affirm* the contract, treat the buyer's obligation as subsisting, tender the goods to him or keep them for him, and inforce payment of the price. He could treat the contract as *broken,* resell the goods to recompense himself, as far as possible, for whatever loss he had sustained, and sue for *the remaining damages. He could take one path and only one, and, having made a choice, he could not afterwards return to the starting place and take another.*

* * * * * * *

When the seller elected to take damages instead of price, he *elected to renounce recovery on the notes.* They were obligations *to pay price, and not damages.*

* * * * * * * *

It so happened that, after application of the proceeds of resale the unpaid notes *exactly or substantially*

> equaled the remainder of the damages resulting from breach of the contract and Adams simply mistook his remedy. *He had no cause of action on the notes, and no choice between remedies, after the irrevocable act of resale. But one remedy was then available, an action for damages*, and his attempt to complete his relief by unauthorized means did not constitute an election, within the proper meaning of that term, which applies *to the first pronounced act of election*" (italics ours).

In the still later case of *Fee & Liddon Co.* v. *Porter*, 144 Kan. 108, 58 Pac. 2d 55, the Supreme Court of Kansas states:

> "This appeal involves the question of *whether statements contained in a letter constituted an election of remedies*" (italics ours).

The facts were that defendant had agreed to purchase certain real estate and, after making some payments, allowed the contract to go in default. After a period of time the seller wrote the buyer a letter, saying:

> "* * * I take it from this letter that you have no intention of completing the purchase of this lot. This is further clearly indicated by the fact that you have not made a payment on account in over a year and have not paid either interest or taxes for which you have been billed. The entire amount of the contract is, therefore, now due and payable. * * *
>
> We are accordingly, in accordance with the contract, demanding that these amounts, totalling $1,-698.85, be paid within the next thirty days, and should they not be paid we shall have to assume that you have no idea of completing this contract and we shall cancel it on our books in according with the terms thereof."

The trial court held that as a matter of law the statement contained in the letter "constituted an election to

cancel and rescind the contract. * * * and that such election released defendant from all further liability under the contract, and judgment was accordingly rendered in favor of defendant and against the plaintiff, which appears."

The Supreme Court of Kansas, affirming the judgment, said:

> "It is clear from the above contract that when the purchaser defaulted in payment, the vendor had an election either to cancel the contract and retain the payments theretofore made by the purchaser as liquidated damages, in which event the purchaser's rights to the real estate would be cut off, or to sue for the balance due on the contract, in which event the purchaser would be entitled to the real estate and the vendor would have to recover on his judgment. Faced with this situation, the vendor wrote the above letter. From it, it appears the vendor was convinced the purchaser did not intend to make further payments. After stating the balance then due, the vendor informed the purchaser that if this amount was not paid within the next thirty days, the contract would be canceled.
>
> *In this state, it has been consistently held that where a party has the right to choose between two inconsistent remedies and, with knowledge of the facts, deliberately elects to follow one of them, he cannot thereafter make a new election and pursue the other remedy, and that the election does not depend on the form, but on the essence of the remedy* (See *Ireland* v. *Waymire,* 107 Kan. 384, 191 Pac. 304, and cases cited; *Trust Co.* v. *Adams,* 107 Kan. 492, 192 Pac. 761; *Ramsey* v. *Bank Commissioner,* 115 Kan. 212, 216, 222 Pac. 117; *Pitt* v. *Keenan,* 124 Kan. 810, 262 Pac. 567). And various phases of the doctrine are treated in other of our decisions" (italics ours).

It is, therefore, clear that when the District Court in the case at bar, in the face of the admission by Butler's president on the witness stand that it, on breach of the contract, had elected to resell and had given notice to that effect and had made a resale pursuant to such election declared that "resale is immaterial" (Conclusions 2 and 3, R. 26) it was directly in conflict with a plain decision of the Supreme Court of Kansas. When it then proceeded to ascertain the market value at the time and place of breach and to assess damages as the difference between the contract price and market price and to render judgment against petitioners on such basis, it was doing that which is not countenanced and not permitted under the law of the State of Kansas.

The reasoning resorted to by the Circuit Court of Appeals in sustaining the judgment of the District Court thus arrived at is equally discordant with the law of Kansas.

To say, as it did, that the question of election to resell was *removed* from consideration because Butler and Horwitz (the purchaser at the resale), for reasons satisfactory to themselves, combined together a week or ten days after the resale to cancel the resale contract does not at all change or obscure the fact that the seller elected to resell. The buyer, whose measure of liability had thus become fixed, and who was vitally interested was not consulted. Since the buyer was bound by the election to resell, he could not be cast to a different liability, by an *ex parte* undisclosed, rescission of the sale. The seller's election to resell was as fully unequivocal as the election of the seller in the *Fee & Liddon Co. case, supra.*

It was more unequivocal because there was not only the announcement of an intention transmitted to the buyers but an actual resale pursuant to such announced intention. The fact that Butler and the purchaser at the resale saw fit for any reason, or for no reason, to cancel the contract of sale is legally immaterial under the laws

of Kansas so far as the question presented to the District Court and to the Court of Appeals is concerned.

The holding of the Circuit Court of Appeals that "there is no inconsistency of remedies" and that a "resale is but one method of determining the market price" when given the application indulged in by the courts below conflicts not only with the express statements of the Supreme Court of Kansas but with the essence of the rule as pronounced, expounded and applied by that court. The rights and liabilities of the buyer thus once fixed, could not be altered by collusions of the seller and the resale purchaser.

The Supreme Court of Kansas says the two things are not the same and are not intended to be the same. Even the fact that the application of the proceeds of resale to the unpaid notes in the *Central Trust Company Case, supra*, resulted in the balance of the notes exactly or substantially equalling the "remaining damages" after applying the net proceeds of resale was noted by the Supreme Court of Kansas, but it was nevertheless pointed out that notwithstanding such fact there was but one remedy then available and but one measure of damages available, namely to sue for and recover the difference between the contract price and the net proceeds of resale.

It is obvious that the learned Circuit Court of Appeals has, in preparing its opinion, adopted principles of law that may be announced by the courts of some states in such a situation but which are not followed in Kansas.

Nor is this the general rule followed by the Federal courts prior to *Erie* v. *Railroad Co., supra.* For example it is in direct conflict with the opinion of the Seventh Circuit Court of Appeals in *Sloss-Sheffield Steel & Iron Co.* v. *Stover Mfg. & Engine Co.*, 37 F. 2d 877, which held that where, as here, the seller has alternative remedies, upon an election to resell he *"is bound by it and cannot pursue*

an inconsistent remedy." In the *Sloss Case*, the market price at the time of breach was considerably below the contract price, but upon resale the goods brought a price in excess of the contract price. The Court held that the election was irrevocable and "having so elected, it cannot now recover the excess of the contract price over the market price."

The Kansas cases cited by the Circuit Court of Appeals that the measure of damages for breach of contract of sale is, under the rule established by Kansas decisions, *ordinarily* the difference between the contract price and the market price of the goods are not in point.

Here, as a consequence of the failure to accurately, fully and realistically apply settled principles of Kansas law, a recovery has been allowed with neither pleading nor proof of the only basis on which a lawful recovery could be had.

If there is to be any vitality to the pronouncement of this Court that "the law to be applied in any case is the law of the state," then enforcement of the rule must be required by this Court in such number of cases that the long established habit of courts of the United States will give way in a full realization that there are no principles of law affecting substantive rights to be applied or drawn upon except as they are found in the laws of the state.

Unless the force of old methods of approach is checked at the outset, the new era of uniformity of substantive rights in Federal and State courts will die aborning. Soon the whole principle of uniformity will be destroyed by the ingrafting of this or that exception to or modification of the law of the state and all contrary to the law of the state. The much to be desired uniformity will become a mere theoretical thing and not an actuality.

It is respectfully submitted that the writ prayed for be granted.

Respectfully submitted,

IRVINE E. UNGERMAN,
Ritz Building,
Tulsa, Oklahoma,

I. J. RINGOLSKY,
HARRY L. JACOBS,
515 Commerce Building,
Kansas City, Missouri,

WM. G. BOATRIGHT,
616 Commerce Building,
Kansas City, Missouri,
Counsel for Petitioners.

(36)

Office - Supreme Court, U.
FILED
JUL 21 1941
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 167

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY,
Petitioners

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN M. P. MILLER,
Kansas City, Mo.
Of Counsel.

MAURICE J. O'SULLIVAN,
700 Gloyd Bldg.,
Kansas City, Missouri.
DAVID R. MILSTEN,
807 Tulsa Loan Bldg.
Tulsa, Oklahoma.
Attorneys for Respondent.

SPENCER D. BOVARD, LAW BRIEF PRINTER, 1020 MC GEE, K. C., MO.

TABLE OF CASES CITED

PAGE

Central Trust Company vs. Adams, 107 Kan. 492, 192 Pac. 761 3
Darnell vs. Haines, 119 Kan. 633, l. c. 634, 240 Pac. 582 5
Griffin vs. McCoach, ... U. S. ....., ... S. Ct. ...., 85 L. Ed. (adv. op.) 972 1
Habeler vs. Rogers, 131 Fed. 43, l. c. 45, 46 (C.C.A. 2).. 5-6
International Trading & Rice Corp. vs. Benscheidt, 141 Kan. 416, 41 Pac. (2d) 737, 738 (Subd. 1, 2).... 5
Klaxon Co. vs. Stentor Elect. Mfg. Co., ... U. S. ....., ... S. Ct. ...., 85 L. Ed. (adv. op.) 969 1
Meyer vs. W. R. Grace & Co., 290 Fed. 785 (C. C. A. 7) l. c. 787 6
Midland S. & L. Co. vs. Tradesmen's Nat. Bank, 57 Fed. (2d) 686 (Kan. C. C. A. 10) 5
Minneapolis Nat. Bank vs. Liberty Nat. Bank, 72 Fed. (2d) 434 (Kan. C. C. A. 10) 5
Montgomery County Nat'l vs. Wherry, 102 Kan. 224, 196 Pac. 1146 ..... 5, 6
Moore vs. Potter, 155 N. Y. 481 4
Oil Well Supply Co. vs. First National Bank, 106 Fed. (2d) 399 (Kan. C. C. A. 10) 5
Stegman vs. Offerle Coop. Grain and Supply Co., 151 Kan. 655, l. c. 657, 100 Pac. (2a) 635 6
Union Trust Co. vs. Wiseman, 10 Fed. (2d) 558 (D. C. Oregon) 5
Webber vs. Umback, 125 Kan. 117, 263 Pac. 786 5

TEXTS

20 C. J. 34 6
55 C. J. 1057, Note 22 6

Supreme Court of the United States

OCTOBER TERM, 1941

No. 167

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY,

Petitioners

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Circuit Court of Appeals determined and followed the applicable (Kansas) State law as required by recent decisions such as

Klaxon Co. v. *Stentor Elect. Mfg. Co.*, ... U. S. ....., ... S. Ct. ....., 85 L. Ed. (adv. op.) 969, No. 741.

Griffin v. *McCoach*, ...U. S. ....S. Ct. ....., 85 L. Ed. (adv. op.) 972, No. 755.

Petitioner summarizes evidence most favorable to it but overlooks that it conflicts with facts found by the trial court and approved on appeal.

The contrast is illustrated (R. 217-218) where the opinion says:

"* * * The Court found as a fact that plaintiff and Horwitz Iron and Metal Company signed a written form of agreement on July 30, 1938 for sale of this scrap iron, but that the agreement never became operative but was abandoned by mutual consent because of a failure of a meeting of the minds with respect to the nature, kind and character of the material remaining on hand. The Court found that, 'The parties thereto under the facts disclosed by the evidence did not, in fact, reach a meeting of minds with respect to the subject matter of said contract.' This finding of fact, which is sustained by substantial evidence, removes from consideration the contention that the plaintiff elected to resell the undelivered property. What the rights of the parties would have been had the sale been completed need not be considered. There is no inconsistency of remedies in announcing an intention to make a resale or in unsuccessfully attempting to resell and in establishing the market value in an action for damages by evidence of market value. In each instance the seller has elected to hold the buyer liable in damages based on the difference between the contract price and the market value. A resale is but one method of determining the market price. The methods of establishing the market value by resale and of determining it by evidence other than by resale are analogous ways of establishing damages. They are designed to and should reach the same result. Pursuing consistent remedies alternatively to achieve a lawful end does not constitute an election of remedies. *Kansas City Live Stock Commission v. Hamlin Bank, Kans.*, 101 Pac. 617.***"

Yet (Petition P. 2) says:

"* * * it was conceded that a resale, pursuant to such election, had been made (R. 84, Ex. A. R. 46-49) and that subsequently, without notice to the buy-

ers (R. 83) and for private reasons existing between Butler and the purchaser at such resale (R. 49-50; 83), the contract of resale had been cancelled (R. 49-50) and that Butler had thereafter, without notice to petitioners (R. 85-86), applied said scrap in filling certain commitments it had with others.

The price obtained by Butler on the resale (under the contract which it subsequently cancelled) was substantially in excess of what the Court found to be the market price at the time of breach. The difference is approximately $1,500.00. * * * "

The questions presented, reasons relied on and specification of errors rest on the self constructed erroneous premises of fact.

Each specification of error assumes an election to resell, and that it constituted an election of remedies under Kansas law.

The error is disclosed by the opinion on rehearing in *Central Trust Company* v. *Adams,* 107 Kan. 492, 192 Pac. 761. Petitioner cites this but quotes only from the original opinion, 107 Kan. 126, 190 Pac. 755.

At 107 Kan. l. c. 495, the Kansas Supreme Court says:

" * * * Having chosen not to keep the goods to be delivered to the owner on payment of price, he could not sue for price. Goods on one side and price on the other resemble opposite terms of an equation, and whenever goods are eliminated, there is no equivalent for price. The right of the seller must then be stated in another way, that is, in terms of damages. Election to resell was an election to liquidate, as far as proceeds of resale would go, damages resulting from breach of the buyer's obligation to pay price and take the goods, and then to rely on an action for damages for the remainder of the loss, if any. In case of a fair resale, the measure of damages is the difference between the

net resale price and the contract price. The rule is precisely the same as if the contract had remained executory, and the seller had fixed his damages by proper resale. (*Hardwick* v. *Can Co.*, 113 Tenn. 657.)

It requires no argument to demonstrate that the theory underlying recovery of damages is inconsistent with the theory underlying recovery of price. This is just as true when the contract is executed as when it is executory. The two theories are utterly incompatible with each other, and because of that fact, election to proceed according to one of them renders the other unavailable. (*Ireland* v. *Waymire*, 107 Kan.. 384, 191 Pac. 304, and cases cited in the opinion.)"

It approves the doctrine of *Moore* v. *Potter*, 155 N. Y. 481, and quotes therefrom:

"'It is well established by the decisions of this Court that a vender of personal property, when the vendee has declined to take the property and pay for it, ordinarily has the choice of any three methods to indemnify himself against loss: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property and recover the difference between the contract price and the price obtained upon a resale, or (3) he may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price.' (p. 486.)"

In this case there was no effective resale. Respondent followed the indemnity choice numbered (3) above. As indicated in the Kansas rehearing opinion a resale price on a sale fairly conducted may be the best evidence of the market price.

Compare the following:

International Trading & Rice Corp v. *Benscheidt,* 141 Kan. 416, 41 Pac. (2d) 737, 738, (subd. 1, 2) where resale price of sugar was received as evidence of market price. Recovery was on basis of market price.

Webber v. *Umback,* 125 Kan. 117, 263 Pac. 786, where the market value was proved by evidence of the Kansas City hog market less freight, etc., and the sale price of the hogs in question was received to show market price, which governed recovery of damages.

Montgomery County Nat'l v. *Wherry,* 102 Kan. 224, 196 Pac. 1146, where an abortive conditional sale was held not to establish market price. The market price is held to fix damages for breach of purchase contract.

There is no inconsistency of remedies between claiming either the difference between resale or market price and the contract price. Often the resale price is the best evidence of market value.

That there was no such election of remedies is also disclosed by *Darnell* v. *Haines,* 119 Kan. 633, l. c. 634, 240 Pac. 582 which explains that following an incompatible cause of action makes the rule of election operative, but taking different compatible courses, even though proof and measure of recovery are dissimiliar, does not. The doctrine is harsh and its scope is restricted. *Oil Well Supply Co.* v. *First National Bank,* 106 Fed. (2d) 399. (Kan. C. C. A. 10). *Minneapolis Nat. Bank* v. *Liberty Nat. Bank,* 72 Fed. (2d) 434 (Kan. C. C. A. 10). In the absence of inconsistency of remedies, there is no election. *Midland S. & L. Co.* v. *Tradesmen's Nat. Bank,* 57 Fed. (2d) 686 (Kan. C. C. A. 10); *Union Trust Co.* v. *Wiseman,* 10 Fed. (2d) 558 (D. C., Oregon, cited because well reasoned.)

A mistaken notion in giving even a formal notice to resell is not an election. *Habeier* v. *Rogers,* 131 Fed. 43,

l. c. 45, (C. C. A. 2). Telegram advising plaintiff "would sell the goods and sue defendant for damages" was not an act required to pursue any remedy and was neither election or estoppel to maintain action for full purchase price. *Meyer* v. *W. R. Grace & Co.*, 290 Fed. 785, (C. C. A. 7), l. c. 787. Quoted from 20 C. J., p. 34 is:

> "The mere giving of notice of an intention to pursue a certain course, which is not acted upon by either party, or which does not alter nor affect the position of the party receiving it, is not such an election of remedies as will bind the party serving it so as to preclude pursuing a different course,"

An unconsummated agreement of resale is no evidence of market value. 55 *C. J.* 1057, *note* 22, and also *Montgomery County Nat. Bank* v. *Wherry, supra.*

Following a particular evidentiary method of proof of damage is not an election of remedies.

In *Stegman* v. *Offerle Coop. Grain and Supply Co.*, 151 Kan. 655, l. c. 657, 100 Pac. (2d) 635, it is said:

> " * * * Under different sets of facts the courts have used or approved the use of different measures of damages, the theory in each instance being to use the measure of damages which will enable plaintiff to be recompensed for the loss he has sustained.***"

It is submitted that the Circuit Court of Appeals correctly determined and applied the settled principles of Kansas law. No reason exists for certiorari and the petition should be denied.

MAURICE J. O'SULLIVAN,
700 Gloyd Bldg.,
Kansas City, Missouri.
DAVID R. MILSTEN,
807 Tulsa Loan Bldg.
Tulsa, Oklahoma.
Attorneys for Respondent.

JOHN M. P. MILLER,
Kansas City, Mo.
Of Counsel.